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IN THE

SUPREME COURT OF THE UNITED STATES

No. 1323

HOWARD WALLACE BARBEE, ET AL.,

Petitioners

v.

THE UNITED STATES OF AMERICA,

Respondent

Petition For A Writ Of Certiorari To The

United States Court Of Appeals

For The Fifth Circuit

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

Petitioners, Howard Wallace Barbee and Bobby Joe Manziel, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals has not been reported. A copy of the opinion is printed in Appendix A hereof, p. 12. There was no opinion in the District Court.

The judgment and opinion of the Court of Appeals, sought to be reviewed, was dated and entered on February 21, 1968.

Petitioners' Petition for Rehearing (filed on March 11, 1968) was denied on April 18th, 1968.

JURISDICTION

It is believed that 28 U.S.C., Sec. 1254 (1), and Supreme Court Rule 19, Paragraph 1 (b), confer jurisdiction upon the Supreme Court to review the judgment in this case by writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not several compilations and recodifications of the federal counterfeiting Act of June 30, 1864 (Chap. CLXII, Sec. 10), prohibiting having or keeping possession "with intent to alter, publish or sell" an "altered obligation" of the United States, in face of the express provision of the Act of Congress of March 3, 1901, Chap. 853, Sec. 1 (3 Compiled Statutes 1901, pp. 3755-3770), and in the face of the holdings of this Court, construing the same statute, in *Dunbar v. United States*, 156 U.S. 185, changed the nature of the criminal intent, which constitutes an essential element of such offense as recodified in 18 U.S.C., Sec. 472.

2. Whether the purpose of 18 U.S.C. 472, prohibiting possession of altered United States securities "is the protection of funds or currency of the United States," as in the original statute, and whether in addition its purpose now includes, as held by the Court of Appeals, the punishment of "any fraud or wrong" upon individuals.

3. Whether the Court of Appeals has correctly applied in this case the pertinent holdings as announced

by the Supreme Court in *Dunbar v. United States*, 156 U.S. 185; and *Prussian v. United States*, 282 U.S. 675; and whether the opinion of the Court of Appeals is in conflict with those two decisions.

STATUTES INVOLVED

The statutes involved are:

18 U.S.C., Sec. 472, which reads,

"Sec. 472. *Uttering counterfeit obligations or securities.*"

"Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000.00 or imprisoned not more than fifteen years, or both. June 25, 1948, C. 645, 6 Stat. 705."

This section of the statutes (through several codifications) is from the Act of June 30, 1864, which read:

"Chap. CLXII.—*An Act to provide Ways and Means for the Support of the Government, and for other Purposes.*

"Sec. 10. *And be it further enacted,* That if any

person or persons shall falsely make, forge, counterfeit, or alter, or cause or procure to be falsely made, forged, counterfeited, or altered, any obligation or security of the United States, or shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or shall bring into the United States from any foreign place with intent to pass, utter, publish, or sell, *or shall have or keep in possession, or conceal, with intent to utter, publish, or sell,* any such false, forged, counterfeited, or altered obligation, or other security, with intent to deceive or defraud, or shall knowingly aid or assist in any of the acts aforesaid, every person so offending shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine not exceeding five thousand dollars, and by imprisonment and confinement at hard labor not exceeding fifteen years, according to the aggravation of the offence." (Emphasis in the body of Sec. 10 added).

The Act of March 3, 1901, Ch. 853, Sec. 1, (3 Compiled Statutes, 1901, pp. 3769-3770), providing for the compilation of the Criminal Code, fixing the powers of the Commissioners, declared:

"That in performing this duty the said commissioners shall bring together all statutes relating to the same subject, and shall make such alterations as may be necessary to reconcile the contradictions, supply the omissions and amend the imperfections of the original text; *and may propose and embody in such revisions changes in substance of existing law; but all such changes shall be clearly set forth in an accompanying report, which shall briefly explain the reasons for same.*" (Emphasis added).

Other statutes will be referred to by analogy, and where deemed appropriate, will be printed in the Appendix B hereof, p. 29.

STATEMENT OF THE CASE

The sufficiency of the indictment is not presented; nor is any trial error urged either in the Supreme Court or below. Petitioner does not ask that the case be reversed and remanded for a new trial, but that it be reversed and finally disposed of.

The question presented to the Supreme Court is that the nature of the fraud relied upon by the United States does not establish the "intent to defraud" prohibited by the statute (Sec. 472), and as alleged in the indictment.

The petitioners were jointly indicted in the District Court (Tyler Division, Eastern District of Texas) of a conspiracy and substantive offenses of keeping in their possession, with intent to defraud, altered genuine Federal Reserve notes, the serial numbers and plate numbers of which had been changed. (Tr. R., pp. 58-70).

The proof shows that there was no intent "to make counterfeit notes or even to pass the altered note." The defendants used "the note only to get the 'suckers' investment", and "the racket (could) only succeed if the 'sucker' (was) willing to participate in an illegal counterfeiting scheme". (See Court's opinion, pp. 2-3, Appendix A, p. 13.)

"To the 'sucker's' dismay (if the scheme had succeeded), after contributing his share of the investment, he learns that both reserve notes were genuine and that the only process performed had been the altering of serial numbers and other markings on one note to correspond with the other." (Court's opinion, p. 2, Appendix A, p. 13).

The petitioners were convicted under 18 U.S.C., 472, for possession; and not under Sec. 471 for "altering." (Court's opinion, p. 3, Appendix A, p. 14).

The question involving the construction of the federal criminal statute was properly raised by motions and objections to testimony in the trial court, and duly presented upon appeal.

REASONS FOR GRANTING THE WRIT

1. The opinion of the Court of Appeals in construing the nature of the criminal intent to defraud required by 18 U.S.C., Secs. 471 and 472, is directly in conflict with the opinions of the Supreme Court in *Dunbar v. U.S.*, 156 U.S. 185, construing 18 U.S.C., Sec. 472, (then Revised Statutes 1874, Sec. 5431); and *Prussian v. United States*, 282 U.S. 675, construing 18 U.S.C., Sec. 471 (then Criminal Code, Sec. 148).

In *Dunbar* and in *Prussian*, the Supreme Court, in construing Sections 471 and 472, respectively, held:

"Its purpose (Section 472 in *Dunbar* and Section 471 in *Prussian*) has been declared by this court to be the protection of the bonds or currency of the United

States, and not the punishment of any fraud or wrong on individuals" (*Dunbar*, l.c., pp. 193-194; *Prussian*, l.c., p. 678).

Revised Statutes 1874, Sec. 5431, construed by *Dunbar*, reads substantially identical with 18 U.S.C., Sec. 472, under which petitioners were convicted; and Criminal Code, Sec. 148, construed in *Prussian*, reads substantially identical with 18 U.S.C., Sec. 471.

The Court of Appeals in its opinion in our case holds that the possession of a genuine federal reserve note with altered "serial numbers and other markings," for the purpose of inducing a "sucker" to share in the investment in a supposed possible (but actually impossible) scheme to duplicate genuine notes, violates the "possession" provision of 18 U.S.C., 472 (formerly Revised Statutes, Sec. 5431) even though there is no question of alteration by petitioners, and no intent "to utter, publish, or sell"; and that such possession and facts are "harbored" by Sec. 472.

The statute must be strictly construed. See,—*Prussian v. U.S.*, 282 U.S. 675, l.c. 677; also *Fasulo v. U.S.*, 272 U.S. 620; and *U.S. v. Salen*, 235 U.S. 237.

The Court of Appeals confuses "intent to injure" with "intent to defraud." It matters not that the intent be to injure the United States, nor whether it be to injure an individual; nor, for that matter, that it is intended to injure anybody.

The criminal intent in "false making," "counterfeiting," "altering," "uttering," and "possession" statutes, under 18 U.S.C., Chap. 25, Sections 471-509, (with possibly one or two exceptions, which may require no "fraudulent intent"*) is in the "spurious or fictitious makings", and not in the fraudulent purpose for which it is made, possessed, or uttered. See,—*Gilbert v. U.S.*, 370 U.S. 650, l.c. 755-756, construing 18 U.S.C., Sec. 495.

Both sections 471 (altering) and 472 ("possession" and "uttering") were originally included in the same section of the law; the Act of June 30, 1864, Chap. CLXII, Sec. 10. It is not disputed that the statute at that time expressly provided as contended by petitioners. It provided that any person who,—

"shall have or keep in possession, or conceal, with intent to pass, utter, publish, or sell, any such false, forged, counterfeited, or altered obligation," shall be guilty and subject to the sanctions of the statute.

The statute first was divided into separate sections by the Revised Statute of 1874, Chap. Five.

Mr. Justice Stone in 1931 said in *Prussian*, at p. 678, in referring to the counterfeit statutes, that: "The legislation took substantially its present form in the Act of June 30, 1864." An excellent history of the Currency Statutes of the United States is to be found

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*18 U.S.C., Secs. 471 and 481, with reference to possession of paper and counterfeit plates, and photographing United States notes by their terms require no fraudulent intent; and it has been held that none is required. See,—*U.S. v. Raynor*, 302 U.S. 540; and *U.S. v. White*, (C.C. Mo. 1886) 27 F. 290.

in *U.S. v. Raynor & Fowler*, 302 U.S. 540, l.c., pp. 543-545.

The intention to make substantive changes, particularly in criminal statutes, is not ordinarily ascribed to codifiers. See,—*Fourco Glass Co. v, Transmirra Corp.*, 353 U.S. 222, l.c. 227; 2 *Sutherland Statutory Construction*, 3rd ed., Sec. 3709; and *Perkins on Criminal Law*, (1957) pp. 312-313.

The Act of March 3, 1901, Chap. 853, Sec. 1 (3 Compiled Statutes, 1901, pp. 3769-3770), expressly provided that any changes "in substance" in the Criminal Code "should be clearly set forth in an accompanying report, which shall briefly explain the reason for same".

The changes "in substance" were set out by the Commissioners in 1901, in Doc. No. 68, Part 2, 57th Congress, 1st Session. No change was indicated in the "possession of altered securities" section.*

In view of the expressed statement of the Congress, it can hardly be said that so vital a change has been made in the Act of 1864, Chap. CLXII, Section 10, as to possession "with intent to utter, publish, or sell," as to entirely change the nature of such intent.

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*Petitioners in Appendix C-16 to their Brief in the Court of Appeals included the material portions of this document No. 68, an an Exhibit. Also attached as an Exhibit, in Appendix C-8-14, of Appellants' Brief in the Court of Appeals was the Commissioners' Report on Revision and Codification of Laws, etc., 1908, Report 10, Part 1, 60th Congress, 1st Session.

Petitioners have appended to this Petition as Appendix C, pp. 37-42, without any argument, a detailed "History of Title 18 U.S.C., Secs. 471 and 472".

The petitioners believe that the time is propitious for the Supreme Court to reassert the doctrine of *Dunbar v. United States*, 156 U.S. 185, and *Prussian v. United States*, 282 U.S. 675, that the Federal Counterfeit and Forgery Statutes (18 U.S.C., Chap. 25) are not "swindling" statutes to protect "suckers" but are statutes passed to protect the Currency and Securities of the United States.

The Supreme Court has not passed upon this question since the statute was renumbered 18 U.S.C., Sec. 472 in the U. S. Code of 1948; and became "positive law".

The heavy load of criminal cases upon the Federal Courts does not commend a broad construction by inference of a criminal counterfeit statute, in an effort to prosecute a purpose to swindle, in order as the Court of Appeals says, to prevent the "government" from being "an unwitting accessory in crime." (Opinion of Court of Appeals, p. 9, Appendix A, p. 19).

How the United States "by issuing money" becomes such an "accessory" is far from clear. The United States "has a valid interest in guarding against fraudulent misuse of its services even if the fraud, (again the Court of Appeals confusing "criminal intent" with "injury"), may never injure the government itself".

The Congress has not so enacted. It has the power

to say, but it has not said, that it shall be a federal crime "to devise a scheme to defraud, and to use an obligation or security of the United States to carry out such scheme".

It is doubtful that the Congress would desire to pass such a law, since all schemes to defraud and to swindle eventually involve or have for the purpose the use of United States money. Certainly the Courts should not so construe the counterfeit and forgery laws, in which the criminal intent is in the "execution" and "false making", the "possession", and the "uttering" of spurious currency of the United States.

Petitioners believe the conflict with *Dunbar* and *Prussian* indicates summary action and reversal.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23822

HOWARD WALLACE BARBEE and BOBBY JOE MANZIEL,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Eastern District of Texas.

(February 21, 1968)

Before WISDOM, THORNBERRY and GOLDBERG, Circuit Judges.

GOLDBERG, Circuit Judge: In 1963 Howard Wallace Barbee and Bobby Joe Manziel, then gullible and

motivated by avarice, lost ten thousand dollars in a confidence racket. The memory of that hoax lingered with them, and two years later, still motivated by avarice, they sought to recoup their losses by instigating the same racket for their benefit. The only difference was that their intended victim notified the police, and Barbee and Manziel were arrested. They were convicted in a federal district court for illegal possession of altered currency in violation of 18 U.S.C. § 472, which currency had been the subject of their fraud. Their appeal, unlike many criminal cases that come before us, is not burdened with significant factual disputations. Barbee and Manziel admit the facts of their scheme and even concede that it may have been morally reprehensible. The contest merely its illegality.

The confidence racket which was employed in 1963 and in 1965 involves a "stir man," a genuine federal reserve note, an altered federal reserve note, and of course a "sucker." The "stir man" contacts a "sucker" and shows him a "counterfeit" reserve note which is an exact duplicate of a genuine note and which even experts would claim to be genuine. He guarantees that a revolutionary duplication process can be put in motion for quite a reasonable investment. To the "sucker's" dismay, after contributing his share of the investment, he learns that both reserve notes were genuine and that the only process performed had been the altering of serial numbers and other markings on one note to correspond with the other.

Two facets of this confidence racket concern us on appeal: (1) The "stir man" never intends to make

counterfeit notes or even to pass the altered note. He uses the note only to get the "sucker's" investment. (2) The racket can succeed only if the "sucker" is willing to participate in an illegal counterfeiting scheme. We also note that Barbee and Manziel (appellants) were convicted under 18 U.S.C. § 472, *possession* of altered currency, rather than under 18 U.S.C., the act of *altering*. Nevertheless, though the facts be somewhat unconventional even in the world of counterfeiting, we hold that such facts are harbored by Section 472 and affirm.

Section 472 of the Criminal Code reads as follows:

> "Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, *or with like intent* brings into the United States or *keeps in possession* or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisonment not more than fifteen years, or both." (Emphasis added.)

The appellants ask us to read into the statute the dual requirement of intent to defraud and intent to pass; thus, they would have us interpret the statute as if it read as follows:

> "Whoever, with intent to defraud, . . . [acts listed], or *with like intent to defraud by passing, uttering, publishing, or selling, . . . keeps* in possession. . . . any . . . altered obligation or othe security of the United States, shall be fined . . . ." (Emphasis added.)

They would have us conclude that although they may

have been guilty of swindling,[1] because of their lack of intent to pass the altered note, they did not commit a federal crime.

The government, in response, asks us to interpret the statute as if it read as follows:

> "Whoever, with intent to defraud, . . . [acts listed], *or with like intent to defraud in any manner using altered obligations*, . . . keeps in possession . . . any . . . altered obligation or other security of the United States, shall be fined . . . ." (Emphasis added.)

Under such a reading the appellants clearly would be guilty of violating Section 472.

Although there are no modifiers of the word "possession" in the statute, the appellants see in the evolutionary history of the statute the justification for their proposed construction. They admit that an addition must be made to the present words, but they claim such addition is required when we pollinate Section 472 with historical perspective. Before the present codification (enacted in 1948) the relevant statute read as follows:

18 U.S.C. § 265. (Criminal Code, section 151):

> "Uttering forged obligations.—Whoever, with intent to defraud, shall pass, utter, publish, sell, or attempt to pass, utter, publish, or sell, or shall bring into the United States or any

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[1]Their additional contention that it is impossible to swindle a dishonest man will be discussed infra.

place subject to the jurisdiction thereof, *with intent to pass, publish, utter, or sell, or shall keep in possession or conceal with like intent*, any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 and imprisoned not more than fifteen years." (1926) (codified from and using the exact same language as R.S. Sec. 5431; Mar. 4, 1909, c. 321, Sec. 151, 35 Stat. 1116) (Emphasis added.)

Moreover, the 1864 predecessor to Section 472 placed "intent to pass . . ." even closer in the sentence structure to "possession":

Chap. CLXII.—An Act to provide Ways and Means for the Support of the Government, and for other Purposes.

. . .

"Sec. 10. And be it further enacted, that if any person or persons shall falsely make, forge counterfeit, or alter, or cause or procure to be falsely made, forged, counterfeited, or altered, any obligation or security of the United States, or shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or shall bring into the United States from any foreign place with intent to pass, utter, publish, or sell, *or shall have or keep in possession, or conceal, with intent to utter, publish, or sell*, any such false, forged, counterfeited, or altered obligation, or other security, with intent to deceive or defraud, or shall knowingly aid or assist in any of the acts aforesaid, every person so offending shall be deemed guilty of felony, and shall, on conviction

> thereof, be punished by fine not exceeding five thousand dollars, and by imprisonment and confinement at hard labor not exceeding fifteen years, according to the aggravation of the offence." (Emphasis added.)

Appellants' able counsel have traced the history of Section 472 in their brief and have skillfully demonstrated that in no revision from 1864 to 1948 has the "intent to pass" issue been expressly considered. In 1948, for example, the only relevant comment in the revisor's notes to Section 472 was the general statement, "changes in phraseology were made."[2] Moreover, in an introduction to that section-by-section analysis the revisors promised to "explain in detail every change made in text."[3] From such legislative history the appellants contend that the "intent to pass" requirement has remained in the statute in substance despite its terminological evanescence.

We are urged to look to the old and wear blinders on the new because the new comes to us without the credentials of change. The predicate of this argument is that statutory revisions without explications ring in no change and that recodifications without exegetical words are no more than exercises in organized numerology. If we were to consider such predicate in a vacuum, we would find the existing authority somewhat equivocal.[4] However, in the case at bar, the old

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[2]House Rep. No. 304, 80 Cong. 1948, 1st Sess., p. A 36.

[3]*Id.* at p. 9.

[4]When the meaning of a revised statute has been clear, courts have refused to consider any conflicts in revisionary history. *United States v. Bowen*, 1880, 100 U.S. 508, 25 L.Ed. 631; *Continental Casualty Co. v. United States*, 1942, 314 U.S.

law without assistance from the new convicts the appellants. As we shall show, *infra*, there is no dissidence between the present wording of Section 472, the purpose of the statute, and its pre-1948 judicial interpretations.

527, 530, 62 S.Ct. 393, 86 L.Ed. 426, 430. See also *United States v. Oregon*, 1961, 366 U.S. 643, 648, 81 S.Ct. 1278, 6 L.Ed.2d 575, 579. Moreover, the general proposition that courts should not look past the words of a clear statute—often called the 'plain meaning rule"—is a common judicial proposition. See, among numerous others, *Malat v. Riddell*, 1966, 383 U.S. 569, 571-72, 86 S.Ct. 1030, 16 L.Ed.2d 102, 104; *C. I. R. v. Brown*, 1965, 380 U.S. 563, 571-72, 85 S.Ct. 1162, 14 L.Ed.2d 75, 82; *Electric Co. v. Southern Construction Co.*, 5 Cir. 1967, 383 F.2d 135, 138-39; *Minnesota Mining and Manuf. Co. v. Norton Co.*, 6 Cir. 1966, 366 F.2d 238, 242, cert. den., 1967, 385 U.S. 1005, 87 S.Ct. 711, 17 L.Ed.2d 544. On the other hand, when the meaning of a revised statute has been subject to doubt, courts have relied heavily on the revisors for guides to interpretation. Notable reliance in the *absence* of any specific revisor's comment can be found in *Fourco Glass Co. v. Transmirra Products Corp.*, 1957, 353 U.S. 222, 227, 228, 77 S.Ct. 787, 1 L.Ed.2d 786, 789, 790; *Greenwood v. Peacock*, 1966, 384 U.S. 808, 816, 86 S.Ct. 1800, 16 L.Ed.2d 944, 950; *Caribbean Mills, Inc. v. Kramer*, 5 Cir. 1968, No. 24090. See also *Ruth v. Eagle-Picher Co.*, 10 Cir. 1955, 225 F.2d 572, 575, and the numerous cases cited therein. Cf. *Honea v. United States*, 5 Cir. 1965, 344 F.2d 798.

We have found no conflict in the substance of the above cases. In fact, even their language, though often inconsistent as to emphasis, has been consistent in spirit. In 1880 when the Supreme Court installed the "plain meaning rule" as to a statutory revision, it said: "When the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in the revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress." *United States v. Bowen*, supra, 100 U.S. at 513-14. Four years later when the same court refused to reconsider the interpretation of a revised statute, it stated a proposition not inconsistent with the one in *Bowen*: "A change of phraseology in a revision will not be regarded as altering the law where it had been settled by plain language

The government does not establish services for the benefit of thieves. It does not wish to be an unwitting accessory in crime. Therefore, it has a valid interest in guarding against fraudulent misuse of its services, even if the fraud may never injure the government

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in the statutes, or by judicial construction thereof unless it is clear that such was the intent. . . Of course a change of construction will be deemed as intended to make a change in the law." *McDonald v. Hovey*, 1884, 110 U.S. 619, 629, 4 S.Ct. 142, 28 L.Ed. 269, 272.

Unfortunately, however reasonable *Bowen, McDonald*, and their offspring may be, they continually beg an important issue. Whether or not the words of a statute are clear is itself not always clear. It could be contended perhaps that, because denotations and connotations in legal expression often defy the rules of logic and syntax, no statute has a "plain meaning." This view has not precipitated an abandonment of the "plain meaning rule," but courts have been willing to look behind otherwise clear language when a literal reading of a statute was inconsistent with its congressional purpose. *United States v. Ivey*, 5 Cir. 1961, 294 F.2d 799, 803; *C. I. R. v. Kelley*, 5 Cir. 1961, 293 F.2d 904, 912; *Missouri Pac. Ry. Co. v. Austin*, 5 Cir. 1961, 292 F.2d 415, 418.

The problem relevant to a provision such as Section 472 is an even narrower point. Assuming no conflict between words and purpose, to what extent can revisionary history make otherwise clear statutory language unclear and thus subject to further scrutiny? The cases cited in this footnote demonstrate two methodological approaches which in a laboratory situation could bring different results.

Although judicial resolution of the problems indicated above has been negligible, we can recommend at least one treatment that is as scholarly as it is exhaustive. Witherspoon, "Administrative Discretion to Determine Statutory Meaning: 'The High Road,'" 35 *Texas L. Rev.* 63 (1956); Witherspoon, "Administrative Discretion to Determine Statutory Meaning: 'The Low Road,'" 38 *Texas L. Rev.* 392, 572 (1960); "Administrative Discretion to Determine Statutory Meaning: 'The Middle Road,'" 40 *Texas L. Rev.* 751 (1962).

itself. For recent examples, see *Bannister v. United States*, 5 Cir. 1967, 379 F.2d 750 (conviction for use of mails in execution of a fraud); *Barnett v. United States*, 5 Cir. 1967, 384 F.2d 848, 854-55 (conviction for altering the dates of coins to make them "antiques"). Moreover, because attacks upon the physical integrity of currency in particular may endanger society by depleting the public trust in its economic standard, the government must establish sanctions to discourage such attacks. See *United States v. Raynor*, 1938, 302 U.S. 540, 58 S. Ct. 353, 82 L.Ed. 413.

These sanctions need not extend to all forms of fraud in the society where money is exchanged. Thus, the Supreme Court has held counterfeiting laws inapplicable to fraudulent transactions—even when counterfeit bills were exchanged—if the parties believed the currency to be valid. *United States v. Carll*, 1882, 105 U.S. 611, 26 L.Ed. 1135; *Dunbar v. United States*, 1895, 156 U.S. 185, 193, 15 S.Ct. 325, 39 L.Ed. 390, 393; *Prussian v. United States*, 1931, 282 U.S. 675, 678, 51 S.Ct. 223, 75 L.Ed. 610, 612-13. As stated in *Dunbar, supra*:

> "The purpose of [the existing counterfeiting statute] is the protection of the bonds or currency of the United States, and not the punishment of any fraud or wrong upon individuals." 156 U.S. at 193.

Nevertheless, the sanctions should be applied when the physical integrity of the currency is challenged in any way. As stated by our Court in *Brooks v. United States*, 5 Cir. 1935, 76 F.2d 871:

> "The manifest object of the statute here involved is to protect against *all attempts at fraud* upon the genuine monetary obligations or securities of the United States." (Emphasis added.)

In 1935 the Tenth Circuit affirmed a conviction for a counterfeiting hoax almost exactly like the one at bar. We quote the Court's analysis in that case:

> "The offense denounced by section 148, supra, is the alteration of an obligation of the United States with intent to defraud. *The alteration need not be one which destroys or impairs the validity of the obligation. It is enough if an alteration is made in furtherance of a scheme to defraud and it is not necessary that the United States be the intended or actual victim of the scheme.* An alteration made as a material part of a scheme to defraud any person comes within the terms of the statute. Crouch v. United States (C. C. A.) 298 F.437. The test, therefore, is whether the alterations in question were material to a scheme to defraud. The scheme was to convince Billington that through a chemical and rolling process appellants were producing replicas of genuine $5 bills, to persuade him to furnish $2,500 in new bills of five, ten, and fifty dollar denominations under the pretext that they would make replicas and divide the profit, but in fact to abscond with the money thus furnished. In order to convince him that they were producing replicas of genuine notes, it was necessary to exhibit to him two bills bearing the same serial numbers, check letters, and face plate numbers. That was accomplished by the alterations set forth in the indictment. The alterations were not only ma-

> terial to the fraudulent scheme, but they were essential to it. They were the essence of it in the sense that the fraud could not be effected without them. Plainly the contention that they were immaterial cannot be sanctioned." *Foster v. United States*, 10 Cir. 1935, 76 F.2d 183, 184.

The above analysis has recently been quoted by our Court in affirming as to substance the conviction of three men who had increased the trading value of coins by altering the dates on such coins. *Barnett v. United States, supra*, 384 F.2d at 854-55.

To be sure, the Tenth Circuit's conviction in *Foster* was based on Section 148 (then 18 U.S.C. § 262 and currently codified as 18 U.S.C. § 471) which prohibits "altering" "with intent to defraud" and which has never included in its statutory framework an "intent to pass" requirement.[5] Likewise, the relevant statute in our *Barnett* case makes any fraudulent altering a crime.[6] Nevertheless, the *Foster* holding is equally applicable to the present wording of Section 472 which,

---

[5]Section 148 read as follows:

"Whoever, with an intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States shall be fined not more than $5,000 and imprisoned not more than fifteen years."

The present Section 471 is substantially the same, and the 1864 statute, quoted supra, contained no "intent to pass" reference as to the crime of altering.

[6]18 U.S.C. § 331: "Whoever fraudulently alters, defaces, mutilates, impairs, diminishes, falsifies, scales, or lightens in any way any of the coins coined at the mints of the United States . . . ."

like Section 471, contains no indication of an "intent to pass" requirement.

Moreover, even under the pre-1948 wording of what is now Section 472 many courts repudiated any "intent to pass" requirement. The discussion in *United States v. Provenzano*, S.D. N.Y. 1909, 171 F. 675, 676-77, demonstrates the earliest such rejection:

> "It is contended that, where there is mere possession with knowledge of the counterfeit character of the obligation, it is necessary to charge in the indictment, and prove, not only an intent to defraud, but an intent to pass, publish, utter, or sell the same. In short, that one who passes, etc., must do so with intent to defraud, but that mere possession of such a counterfeit and keeping in possession with knowledge of its character, and with intent to use it to defraud, is not a crime.
>
> I do not so construe this section of the Revised Statutes [the 1901 predecessor to Section 472, closely resembling the 1909 revision quoted supra]. The words 'with like intent' refer to the intent to defraud, not to all of the intents previously named, or to the intent attached to bringing counterfeits, etc., into the United States. Possession with intent to defraud, or with intent to pass, or utter, or sell, or publish, is sufficient. Mere possession with knowledge of the counterfeit character is not sufficient. There must be, with keeping in possession, an intent to defraud. An intent to pass or utter counterfeit silver certificates as good and genuine for a consideration would be an intent to defraud. It is plain that Congress intended to make the intent to defraud the criminal intent; for the section

starts off by saying, 'Every person who with intent to defraud' does certain things, or who attempts to do certain things, or who brings certain counterfeits into the United States with intent to pass, etc., or who keeps in possession or conceals any counterfeit, etc., 'with like intent,' meaning plainly the main intent first mentioned, is to be punished.

As the objection is as to the indictment, which charged an intent to defraud and did not charge an intent to pass, utter, publish, or sell, and the evidence showed possession of counterfeit silver certificates with knowledge of their character and an intent to pass, or utter, or sell same—that is, dispose of same as genuine—and thus defraud the taker or takers, and the jury was told they must find such intents in order to convict, and did so find, I hold the conviction good. I am not willing to hold, in face of the statute referred to and quoted, that it is not a crime to have and keep in possession, knowing their spurious character, counterfeit silver or gold certificates, with intent to defraud some person or persons therewith. I think the statute, reasonably construed to effectuate the plain intent thereof, makes such a possession with such knowledge and such an intent a crime.

The motion in arrest of judgment is overruled."

In 1935 our Court upheld a conviction for fraudulent possession of altered currency and stated:

"It was unnecessary for the indictment to state in what manner the fraud would be or was intended to be perpetrated. If it had

> contained such an allegation, it would have been improperly pleading the evidence." *Smith v. United States*, 5 Cir. 1935, 74 F.2d 491.

The *Smith* opinion was cited fourteen years later in *McKinney v. United States*, 9 Cir. 1949, 172 F.2d 781, when the Ninth Circuit specifically negated the need for an intent to pass under the immediate predecessor to Section 472:

> "In the instant case this instruction was given:
>
> 'The jury must find beyond a reasonable doubt that the defendant kept such described altered security in his possession with knowledge of its character and with intent to defraud.'
>
> . . .
>
> A reading of 18 U.S.C.A. § 265 discloses several alternative methods of violating such statute. One is with intent to defraud to keep in possession any such altered obligation. While each count of the information charged the appellant with such possession with intent to defraud each also in addition charged intent to pass. A conviction based upon an indictment charging possession with 'intent to defraud' and without any charge of 'intent to pass' was sustained in Smith v. U. S., 5 Cir., 74 F.2d 941. The additional language in the information before us of 'and with intent to pass' is clearly surplusage. The court's instructions eliminated such surplusage so that the jury's verdict definitely determined that the appellant had possession of the

split notes with intent to defraud." 172 F.2d 782-83.

The appellants counter the above cases by excerpting the following sentence from our opinion in *Riggs v. United States*, 5 Cir. 1960, 280 F.2d 750, 752:

> "When 'intent to defraud' under Section 472 is charged generally, we agree with the view of Judge Learned Hand, expressed in the case last cited [*United States v. Rabinowitz*, 2 Cir. 1949, 176 F.2d 732, 734], that there is no tenable distinction between such intent and the intent required by the next section, viz: '* * * with the intent that the same be passed, published, or used as true and genuine * * *.' 18 U.S.C.A. § 473."

We find no solace for the appellants in *Riggs* when the above words are read in context. In that case we affirmed the substantive aspect of a conviction even though the defendant himself had never defrauded anyone. He had sold counterfeit bills to another who, knowing such bills to be counterfeit, accepted them with the intention of passing them to others as genuine bills.

The sentence which immediately precedes the one excerpted by the appellants reveals the thrust of the *Riggs* opinion:

> "As to the substantive counts, the 'intent to defraud' required by 18 U.S.C.A. § 472, when, as here, such intent is not restricted by the terms of the indictment or by a bill of particulars to any specified person, may be an 'intent to defraud' unknown third persons or

> the United States itself. [authority cited]" 280 F.2d at 752.

The *Riggs* holding, then, extends the nature of the term "fraud" to include one potentially perpetrated by a cohort on an unknown third party. But it does not restrict the scope of illegal intentions to require this specific form of fraud. It is a conjunctive rather than an exclusive description. In fact, the *Riggs* opinion quotes *Brooks v. United States, supra,* in which "intent to pass" was considered irrelevant in a Section 472 (then 18 U.S.C. § 265) conviction. We find the same meaning in *Rood v. United States,* 8 Cir. 1965, 340 F.2d 506, cert. den., 381 U.S. 906, 85 S.Ct. 1452, 14 L.Ed.2d 287, which quotes *Riggs* at page 509 of the opinion.

The appellants have advanced an additional argument based on the specifics of the charges filed against them. They contend that the indictment was deficient because it did not allege the name of the potential "sucker." They add that the prosecution would not even supply that name in a Bill of Particulars. Although we question the nicety of the government's lack of cooperation, we find no reversible error. The indictment sufficiently informed the appellants of the nature of their charges even though no victim's name was mentioned. *Mount v. United States,* 5 Cir. 1964, 333 F.2d 39, 42-43, cert. den., 379 U.S. 900, 85 S.Ct. 188, 13 L.Ed.2d 175; *Rua v. United States,* 5 Cir. 1963, 321 F.2d 140, 141. *Cf. Borroto v. United States,* 5 Cir. 1964, 338 F.2d 60; *Snowden v. United States,* 5 Cir. 1967, 384 F.2d 357; *Escobar v. United States,* 5 Cir. 1967, No. 23529. Concerning the requested Bill

of Particulars, in *Leary v. United States*, 5 Cir. 1967, No. 23570, this Court restated the following doctrine:

> "Granting or denial of a bill of particulars is a matter within the sound discretion of the trial judge, and will not be interfered with on appeal unless there is abuse or prejudice. [cases cited]." page 22

We can see no abuse or prejudice to these appellants in the denial of the Bill of Particulars. *Cf. Nees v. Culbertson*, 5 Cir. 1968, No. 24400.

Finally, the appellants contend that a "sucker" cannot be defrauded because to be a "sucker" he must be dishonest; i.e., it is impossible to defraud a dishonest man. This argument is completely without merit. The victims of most confidence rackets have avarice in their hearts. Mutual dishonesty might bar a civil action, but the criminal law does not operate on a set-off or counterclaim policy. Moreover, as we have described, *supra*, the counterfeiting statutes seek to protect the integrity of the currency. Therefore, the malevolence of a victim cannot purge a currency alteration of its venality.

AFFIRMED.

APPENDIX B

STATUTES

18 U.S.C.A., Sec. 8.

"Sec. 8. *Obligations or other security of the United States defined.*

"The term 'obligation or other security of the United States' includes all bonds, certificates of indebtedness, national bank currency, Federal Reserve notes, Federal Reserve bank notes, coupons, United States notes, Treasury notes, gold certificates, silver certificates, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, issued under any Act of Congress, and canceled United States stamps."

18 U.S.C.A., Sec. 471.

"Sec. 471. *Obligations or securities of United States.*

"Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both. June 25, 1948, c. 645, 62 Stat. 705."

18 U.S.C.A., Sec. 495.

"Sec. 495. *Contracts, deeds, and powers of attorney.*

"Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or

"Whoever utters or publishes as true any such false, forged, altered or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or

"Whoever transmits to or presents at any office or officer of the United States, any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited - -

"Shall be fined not more than $1,000 or imprisoned not more than ten years, or both. June 25, 1948, c. 645, 62 Stat. 711."

Act of June 30, 1964, Chap. CLXII:

"Sec. 13. *And be it further enacted,* That the words 'obligation or other security of the United States,' used in this act, shall be held to include and mean all bonds, coupons, national currency, United States notes, treasury notes, fractional notes, checks for money of authorized officers of the United States, certificates of

indebtedness, certificates of deposit, stamps, and other representatives of value of whatever denomination, which have been or may be issued under any act of Congress.

"Approved, June 30, 1864."

Act of February 5, 1867, Chap. XXVI.

Revised Statutes, 1874—Compiled Statutes, 1901.

"CHAPTER FIVE.

"*Crimes Against the Operation of the Government.*

"Sec. 5413 (as amended 1875, 1877).

"*Obligations or other securities of the United States defined.*

"The words 'obligation and securities of the United States' shall be held to mean all bonds, certificates of indebtedness, national bank currency, coupons, United States notes, Treasury notes, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other representatives of value, of whatever denomination, which have been or may be issued under any act of Congress."

"Sec. 5414.

"*Forging or counterfeiting United States securities.*

"Every person who, with intent to defraud, falsely

makes, forges, counterfeits, or alters any obligation or security of the United States shall be punished by a fine of not more than five thousand dollars and by imprisonment at hard labor not more than fifteen years. Act of June 30, 1864, c. 172, Sec. 10, 13 Stat. 221."

"Sec. 5431.

"*Passing, selling, concealing, etc., forged obligations.*

"Every person who, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or brings into the United States with intent to pass, publish, utter, or sell, or keeps in possession or conceals with like intent any falsely made, forged, counterfeited, or altered obligation, or other security of the United States, shall be punished by a fine of not more than five thousand dollars, and by imprisonment at hard labor not more than fifteen years. Act of June 30, 1864, c. 172, Sec. 10, 13 Stat. 221."

"Sec. 5434.

"*Buying, selling, or dealing in forged bonds, notes, etc.*

"Every person who buys, sells, exchanges, transfers, receives, or delivers, any false, forged, counterfeited, or altered obligation or other security of the United States, or circulating note of any banking association organized or acting under the laws thereof, which has been or may hereafter be issued by virtue of any act of Congress, with the intent that the same

be passed, published, or used as true and genuine, shall be imprisoned at hard labor not more than ten years, or fined not more than five thousand dollars, or both. Act of Feb. 5, 1867, c. 26, Sec. 1, 14 Stat. 383."

Act of May 16, 1884, c. 52 (Compiled Stat., 1901, pp. 3663-3665.)

"An Act to Prevent and Punish the Counterfeiting within the United States of Notes, Bonds, or Other Securities of Foreign Governments. (23 Stat. 22)."

"*Having in possession forged or counterfeited foreign securities or bank notes.*

"Sec. 5. That every person who, within the United States or any Territory thereof, shall have in his possession any such false, forged, or counterfeit bond, certificate, obligation, security, treasury note, bill, promise to pay, bank note, or bill issued by a bank or other corporation of any foreign country, with intent to utter, pass, or put off the same, or to deliver the same to any other person with intent that the same may thereafter be uttered, passed, or put off as true, or who shall knowingly deliver the same to any other person with such intent, shall upon conviction as aforesaid, be punished by a fine of not more than one thousand dollars and by imprisonment at hard labor not more than one year. Act of May 16, 1884, c. 52, Sec. 5, (23 Stat. 23)."

CRIMINAL CODE, ACT OF MARCH 4, 1909 (p. 1088, l.c. 1115-1117)

"CHAP. 321—An Act To codify, revise, and amend the penal laws of the United States."

"CHAPTER ONE

"OFFENSES AGAINST THE EXISTENCE OF THE GOVERNMENT"

"CHAPTER SEVEN

"OFFENSES AGAINST THE CURRENCY, COINAGE, ETC."

"*Forging or counterfeiting securities.* R.S., Sec. 5414, p. 1049. *Punishment for.*

"Sec. 148. Whoever, with intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States shall be fined not more than five thousand dollars and imprisoned not more than fifteen years."

"Sec. 151. Whoever, with intent to defraud, shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or shall bring into the United States or any place subject to the jurisdiction thereof, with intent to pass, publish, utter, or sell, or shall keep in possession or conceal with like intent, any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than five thousand dollars and imprisoned not more than fifteen years."

"Sec. 154. Whoever shall buy, sell, exchange, transfer, receive, or deliver any false, forged, counterfeited,

or altered obligation or other security of the United States, or circulating note of any banking association organized or acting under the laws thereof, which has been or may hereafter be issued by virtue of any Act of Congress, with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than five thousand dollars, or imprisoned not more than ten years, or both."

18 U. S. C. Of 1926

(Vol. 44, U. S. Statutes at Large)

"Sections"

"262. Criminal Code, section 148) *Counterfeiting securities.*—Whoever, with intent to defraud, shall falsely make, forge, counterfeit, or alter any obligation or other security of the United States shall be fined not more than $5,000 and imprisoned not more than fifteen years. (R.S. 5414; Mar. 4, 1909, c. 321, Sec. 148, 35 Stat. 1115.)"

"265. (Criminal Code, section 151.) *Uttering forged obligations.*—Whoever, with intent to defraud, shall pass, utter, publish, or sell, or attempt to pass, utter, publish, or sell, or shall bring into the United States or any place subject to the jurisdiction thereof, with intent to pass, publish, utter, or sell, or shall keep in possession or conceal with like intent, any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 and imprisoned not more than fif-

teen years. (R.S., Sec. 5431; Mar. 4, 1909, c. 321, Sec. 151, 35 Stat. 1116.)"

"268. (Criminal Code, section 154.) *Dealing in counterfeit securities.*—Whoever shall buy, sell, exchange, transfer, receive, or deliver any false, forged, counterfeited, or altered obligation or other security of the United States, or circulating note of any banking association organized or acting under the laws thereof, which has been or may hereafter be issued by virtue of any Act of Congress, with the intent that the same be passed, published, or used as true and genuine, shall be fined not more than $5,000, or imprisoned not more than ten years, or both. (R.S., Sec. 5434; Mar. 4, 1909, Sec. 154, 35 Stat. 1117)."

APPENDIX C.

HISTORY OF TITLE 18 U.S.C., SECS. 471 AND 472

The Government of the United States was forced in order to finance the cost of the Civil War to issue paper currency, and in 1864 some two billion dollars in war obligations were outstanding. In order to protect the currency, the Act of June 30, 1864 was passed to strengthen the old Act of 1837 and make it an effective weapon against counterfeiters. See *United States v. Raynor*, 302 U.S. 540, 545.

Section 10, Chap. CLXII, of that Act is copied in the Petition. Sec. 10, *of that Act*, included substantially our *present statutes* 18 U.S.C., Secs. 471 and 472. (*Reference Index to Compiled Statutes*, 1901, Vol. 3, p. 3814.

There was some difference in verbiage. For example :

Sec. 10 started: "That if any person or persons shall falsely make, forge, counterfeit, or alter," etc.

Sec. 471 starts: "Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters," etc.

The original Act of June 30, 1864 did not expressly include the words "with intent to defraud" with reference to the "false making," etc. These words were put into the Section by the Revised Statutes, 1874, and Compiled Statutes 1901, Sec. 5414; but it was always an element of the offense.

Sec. 10, in regard to possession and concealment, read: "or shall have or keep in possession, or conceal, *with intent to utter, publish, or sell,* any such false, forged, counterfeited, or altered obligation, or other security, with intent to deceive and defraud," etc. (Emphasis added).

Sec. 472 (under which our indictment is brought) reads: 'Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or *with like intent* brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States," etc. (Emphasis added).

The difference is that the Act of June 30, 1864, said "possession, or conceal, with intent to utter, publish, * * * with intent to deceive or defraud," etc., while 18 U.S.C., Sec. 472, says 'with like intent," referring back to the words "with intent to defraud."

The Act of May 16, 1884, Ch. 52, was "*An Act to Prevent and Punish Counterfeit within the United States of Notes, Bonds, or Other Securities of Foreign Governments.*" (23 Stat. 23). Sec. 5 of that Act (3 Compiled Statutes of 1901, p. 3665) prohibits possession of counterfeit obligations "of any foreign country, with intent to utter, pass, or put off the same." The present statute, 18 U.S.C., Sec. 480 provides "with intent to defraud, possesses or delivers," etc.

The Revised Statutes of the United States was en-

acted by the Forty-Third Congress, approved June 30, 1874. (1 Compiled Statutes 1901, p. 3, footnote). There had been previous revisions and compilations. (Act of June 27, 1866, ch. 140; May 4, 1870, ch. 72; March 3, 1873, ch. 241). All of these statutes were strictly compilations, as was the Compiled Statutes of 1901. (Preface, 1 Compiled Statutes, p. iii; Appendix to 3 Compiled Statutes, pp. 3755-3771.)

In the Act of March 3, 1901, ch. 853, Sec. 1 (3 Compiled Statutes, 1901, pp. 3769-3770), in providing for the compilation of the Criminal Code, it was expressly provided, in referring to the powers of the Commissioners:

"That in performing this duty the said commissioners shall bring together all statutes relating to the same subject, and shall make such alterations as may be necessary to reconcile the contradictions, supply the omissions and amend the imperfections of the original text; and may propose and embody in such revisions *changes in substance* of existing law; *but all such changes shall be clearly set forth in an accompanying report, which shall briefly explain the reasons for same.*" Emphasis added).

The Commissioners made no report suggesting any 'change in substance," in connection with Sec. 5414, 5431, or 5434. See, *Report of Commissioners*, May 15, 1901, p. XIII, 9 Senate Documents, 57th Congress, 1st Ses., 1901-1902. Do. No. 68, Part 2.

In the Revised Statutes, The Act of 1864, Sec. 10,

became Sections 5414 and 5431. (Reference Index, 3 Compiled Statutes, 1901, p. 3814).

Sec. 1, of the Act of Feb. 5, 1867, became Sec. 5434.

Revised Statutes, Sec. 5431, became successively, in 18 U.S.C., of December 6, 1926, Section 265; and 18 U.S.C., of June 25, 1948, Section 472.

Prior to the last two general codifications of the United States, the Criminal Code had been codified by the Act of March 4th, 1909, Chap. 321. In that Criminal Codification, Revised Statutes, Sec. 5431, was codified as Section 151.

The history of 18 U.S.C., Sec. 472, under which our indictment is drawn, is as follows:

1. Act of June 30, 1864, p. 221, Chap. VLXII, Sec. 10;

2. Revised Statutes of June 30, 1874, Sec. 5431;

3. Compiled Statutes of 1901, Sec. 5431;

4. Criminal Code of March 4th, 1909, p. 1116, Sec. 151;

5. United States Code of December 6, 1926, 18 U.S.C., Sec. 265; and

6. United States Code of June 25, 1948, 18 U.S.C., Sec. 472.

"Their language has remained substantially un-

changed," (*Roberts v. United States*, (9th Cir.) 331 F.2d 502, 504), viz.:.

1. In the Criminal Code (1909), Chapter Seven is entitled, *"Offenses against the Currency, Coinage, etc."*

2. The heading in 18 U.S.C., of 1926, Chapter 7, *is the same.*

3. In the present edition 18 U.S.C., 1948, it is Chapter 25, entitled *"Counterfeiting and Forgery."*

All of the Acts beginning with the Act of 1866, Ch. 146, down through the Acts of 1901, Chapter 855, have been for the purpose of "Revision and Consolidation of the Statute Law of the United States." See Appendix to 3 Compiled Statutes, 1901, pp. 3755 to 3770.

Only one enabling act authorized "changes in substance of existing law." That was the Act of March 3, 1901, Ch. 853, Sec. 1, quoted from above.

In the original Act of June 30, 1864, Sec. 10, p. 221, in the margin was endorsed, "Penalty for counterfeiting or altering U. S. Securities; for uttering, etc. counterfeit, etc., notes".

In the Codification of the Criminal Code, of March 4, 1909, Sec. 151, in the margin, was endorsed, "Uttering, etc., forged obligations. R.S., Sec. 5431, p. 1053. Punishment for." (This last page number quoted, p. 1053, was to R.S. 1874).

The first United States Code, of 1926, was an effort at pure "compilation." It was expressly provided in the title to the act as follows:

"(a) The matters set forth in the Code, evidenced as hereinafter in this section provided, shall be prima facie the laws of the United States, general and permanent in their nature, in force on 7th day of December, 1925; but nothing in this act shall be construed as repealing or amending any such law, or as enacting as new law any matter contained in the Code. In case of any inconsistency arising through omission or otherwise between the provisions of this Code and the corresponding portion of legislation heretofore enacted effect shall be given for all purposes whatever to such enactments." See, "The Code of Laws of the United States of America in Force Dec. 6, 1926." (United States Government Printing Office, 1926.)

There was no provision in 18 U.S.C., of 1926, that Title 18 was passed as positive law.

The Act of June 25, 1948, Ch. 645, 62 Stat. 683, enacted the Criminal Code, Title 18 into positive law (18 U.S.C., Title, Vol. 1, p. 2).

In adopting Title 18 U.S.C., into positive law in 1948, changes in phraseology were made. See, 80th Congress House Rep. No. 304.

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No. 1323

In the Supreme Court of the United States

OCTOBER TERM, 1967

HOWARD WALLACE BARBEE AND BOBBY JOE MANZIEL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 12–28) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1968. A petition for rehearing was denied on March 19, 1968. The petition for a writ of certiorari was filed on April 15, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

306-185—68

QUESTION PRESENTED

Whether the evidence established an offense under 18 U.S.C. 472.

STATUTE INVOLVED

18 U.S.C. 472 provides:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Texas, petitioners were convicted of having willfully, knowingly and with intent to defraud kept in their possession altered obligations and securities of the United States (18 U.S.C. 472) and conspiracy to commit that offense (R. I, 58–70, 240; R. III, 1167).[1] Each petitioner was sentenced to concurrent terms of imprisonment for four years on each count; execution of the sentences was suspended and petitioners were placed on probation for five years (R. III, 1179–1180). The court of appeals affirmed (Pet. App. 12).

The evidence at trial showed that early in February of 1965 petitioner Barbee displayed to one

[1] The offenses were charged in a six-count indictment, count one being the conspiracy count and counts two through six being substantive counts. Petitioner Barbee was convicted on counts 1, 4 and 6. Petitioner Manziel was convicted on counts 1 and 5.

Whitaker, a Texas businessman, four genuine federal reserve notes—two fives and two fifties—the serial numbers and other markings of which had been altered to make it appear that each of the fives and each of the fifties were identical in every detail (R. II, 572–575, 630–634, 654; R. III, 891, 955, 977, 990). The purpose was to convince Whitaker that one of each of the respective denominations was not genuine but a duplicate which could be reproduced on bleached one-dollar bills by a secret process (R. II, 582, 641–642, 684–706, 711–713). Petitioner Barbee explained that $40,000 worth of these so-called reproduced federal reserve notes could be purchased for $10,000 (R. II, 575–577; R. III, 878) and that he and petitioner Manziel wanted Whitaker to come in for one-third because they could not raise all the money (R. II, 575–577). Whitaker indicated an interest in the deal and returned the four notes to Barbee (R. II, 577–579). Whitaker called the local sheriff's office concerning the matter (R. II, 578–579).

A few days later, Whitaker met both petitioners at Manziel's wrecking yard, where they again discussed the deal and the process by which the notes were "reproduced" (R. II, 579–582). By prior arrangement, the contact man who was to supply the bills telephoned and talked to petitioner Manziel, who informed Whitaker that the exchange would have to be made in Mexico (R. II, 583).[2] After petitioners reas-

[2] The contact man was co-defendant Curtis Dukes (who pleaded guilty to count 1 prior to trial). He had been a party to a similar type of scheme previously used to defraud Barbee and Manziel out of some $6,000 (R. II, 758–768).

sured Whitaker of the safety of a Mexican exchange, the good quality of the reproduced notes and their intent to proceed with the deal, Whitaker left with the four altered notes, ostensibly to show them to a friend in order to raise the money (R. II, 585–589).

That evening Whitaker showed the altered notes to Secret Service Agents (R. II, 591–593, 627–634). The following day one of the agents, posing as a prospective investor in the deal, met with Whitaker and petitioner Barbee at Whitaker's store. The agent examined the bills in Barbee's presence and discussed the reproduction process with him (R. II, 593–594, 635–637, 596–601, 638–644). It was agreed that the agent could make the exchange at the Mexican border (R. II, 645).

The altered notes were returned to petitioner Barbee. He was arrested shortly thereafter as he started to leave (R. II, 601–602, 644–648). Petitioner Manziel was arrested at his wrecking yard (R. II, 648–650). In fact, there was no secret process to make duplicate reserve notes. The scheme contemplated absconding with the victim's money at the time the exchange was supposed to take place (R. II, 697–699, 702–705; R. III, 885–886).[3]

[3] To prove fraudulent intent, the government showed that petitioners had been defrauded out of some $6,000 several years earlier in an identical scheme (R. II, 684–706, 759) and intended to get their money back the same way they had lost it (R. II, 708–709).

ARGUMENT

Petitioners contend that possession and use of a genuine federal reserve note to swindle another, even though the note is materially altered specifically for that purpose, is not an offense under 18 U.S.C. 472 (Pet. 6–11). The statute, however, unambiguously applies to any person who, with intent to defraud, "keeps in [his] possession * * * any * * * altered obligation or other security of the United States * * *." Petitioners' possession of the altered notes, with knowledge of the alteration and with intent to rely on the alteration to defraud another, brought them within the purview of the statute. *Foster* v. *United States,* 76 F. 2d 183 (C.A. 10); *Crouch* v. *United States,* 298 Fed. 437 (C.A. 6); see *Errington* v. *Hudspeth,* 110 F. 2d 384, 386 (C.A. 10), certiorari denied, 310 U.S. 638.

Relying on legislative history, petitioners assert that "intent to defraud" as used in the statute is synonymous with "intent to utter, publish, or sell." While, as petitioners indicate, Section 10 of the June 30, 1864 statute (13 Stat. 218, 221) did require both an "intent to utter, publish, or sell" and an "intent to deceive or defraud" for a conviction for possession of counterfeit or altered obligations, subsequent revision (Revised Statutes Section 5431) and judicial interpretation (*e.g. United States* v. *Provenzano,* 171 Fed. 675 (C.C.S.D.N.Y.)) eliminated the necessity for an intent to pass the notes but retained the "intent to defraud". That intent included, but was not limited to, the intent to pass, utter, or sell. Congress eliminated any possibility of ambiguous construction in the 1948

codification (18 U.S.C. 472) by deleting all reference to an intent to utter, publish or sell. Thus, under the present statute, the only type of intent required to commit the offense is unambiguously delineated as the general intent to defraud. See *McKinney* v. *United States,* 172 F. 2d 781, 782–783 (C.A. 9); *Crouch* v. *United States,* 298 Fed. 437 (C.A. 6); *United States* v. *Provenzano,* 171 Fed. 675 (C.C.S.D.N.Y.). It has long been settled that the "intent to defraud" is not limited to an intent directed against the United States, but broadly covers an intent directed at third persons, both known and unknown. See, *e.g., Riggs* v. *United States,* 280 F. 2d 750 (C.A. 5); *United States* v. *Rabinowitz,* 176 F. 2d 732 (C.A. 2), reversed on other grounds, 339 U.S. 56; *McKinney* v. *United States,* 172 F. 2d 781 (C.A. 9); *Foster* v. *United States,* 76 F. 2d 183 (C.A. 10).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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